IN THE

Supreme Court of the United States

No. 103

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, *Petitioner,*

vs.

Francis L. Hawes, Individually and as Trustee

and

Raymond D. Evans, Trustee

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, deceased, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, in the above-entitled cause, docket number 7844, decided October 12, 1942, petition for rehearing denied November 4, 1942, dismissing the appeal of your petitioner from an adverse judgment in the District Court of the United States for the District of Columbia.

STATEMENT

This Cause grows out of an appeal by petitioner from an adverse judgment in the District Court of the United States for the District of Columbia. After trial upon the merits below each party submitted findings of fact, conclusions of law and decrees, which the Court took under advisement. Subsequently, in chambers, out of the presence of Counsel and parties and without notice, on May 7, 1940, the trial court signed findings of fact, conclusions of law and a decree, and directed his clerk to file and enter the same. No notice was sent to parties of such act or entry as was required under Rule 77 (d) of the Federal Rules of Civil Procedure, nor was a note of such mailing entered in the docket as was also required by Rule 77 (d) Supra. On June 3, 1940, twenty-three days after May 7, 1940, plaintiff's attorney became apprized of the entry of the judgment for the first time, and forthwith noted an appeal therefrom in proper form. (R. Pg. 75). On June 6, 1940, Petitioner's attorney filed a motion "To Enter Judgment and Direct Clerk To Notify Parties," and assigned as reasons therefor the fact that neither counsel nor litigant knew or had notice of the action of the Court, as required by Rule 77 (d) of the Federal Rules of Civil Procedure.

This motion was heard in open Court on June 13, 1940, and, while not granting or denying the same, the Court, without formal motion specifically requesting it, directed petitioner to prepare an order vacating the decree of May 7, 1940, and assigned as reason therefore "the failure of the clerk to notify counsel or litigants and to make a note of such mailing in the docket." Plaintiff below, filed such an order on June 13, 1940, and thereupon the Court entered a second judgment, not materially differing from the prior judgment of May 7, 1940 as to scope and effect, and the clerk properly notified all parties of this action. (R. Pg. 76) Plaintiff below, forthwith (R. Pg. 76) noted an appeal therefrom. On June 14, 1940 (R. Pg. 76) Respondent Hawes did

not note an appeal from the action of the Court in this regard. That Respondent Hawes, treating the original judgment as the only proper or valid judgment, filed a motion to dismiss the appeal of petitioner, assigning as one of the reasons, inter alia, that the Notice of Appeal had not been filed within twenty days of May 7, 1940, the said period being provided for in Rule 10 of the lower appellate court.

Your respondent filed a petition for a rehearing (R. Pg. 79) which was denied on November 4, 1942.

QUESTIONS OF LAW PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia can fix a time other than that set out in Title 28, Section 230 of the United States Code (Ann.) for the taking of appeals.

2. Whether Rule 77 (d) makes the giving of notice by the clerk a prerequisite to the running of the period within which an appeal must be taken in the absence of actual notice.

REASONS FOR GRANTING PETITION

1. This case involves the interpretation of Rules 73 (a) (b), 77 (d), 58, 6 (e), 81 (d) of the Federal Rules of Procedure.

2. That the Lower Appellate Court has misapplied the decisions of the Court as announced in Brooks vs. Harris, 11 How. (U. S.) 204, and Credit Co. vs. Ark. Cent. Ry., 128 (U. S.) 258.

3. That the Court below has misinterpreted the provisions of the following Federal Statutes:

Act of July 30, 1894, c. 172, 28 Stat. 160 Sect. 6.
Act of February 13, 1925, Ch. 229, 43 Stat. 936, Sections 5 and 13.

4. That it is a matter of general importance that the question of the time within which to take an appeal from the United States Court of Appeals for the District of Columbia should be settled by this Court, especially where a proper interpretation of its rules the plain provisions of the New Rules of Civil Procedure, and Applicable Federal Statutes, would seem to be in conflict with the decision of the Court below.

5. That the decision does violence to the apparent effort, both of this Court and the Congress to include the judiciary of the District of Columbia within the Federal System.

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IN THE

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OCTOBER TERM, 1942

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and

RAYMOND D. EVANS, Trustee

Respondents

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF ERROR

I

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the District of Columbia was rendered on October 12, 1942, but is as yet unreported, (R. Pg.) and judgment thereon was entered thereafter.

II

JURISDICTION

Petition for a rehearing was denied in the cause below on November 4, 1942, (R. Pg. 79).

The jurisdiction of the Court is invoked under paragraph c of Section 5 of Rule 38 and Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, ch. 229, Sec. 1, 43 Stat. 938.

III

STATEMENT

A statement of the facts and the questions involved will be found in the petition for a writ of certiorari, Page 2.

IV

SUMMARY OF ARGUMENT

A

Your petitioner claims that the United States Court of Appeals for the District of Columbia, at least since February 13, 1925, has had no authority to fix a time for taking an appeal from the District Court of the United States for the District of Columbia substantially shorter than the period of time provided in the Act of February 13, 1925, 43 Stat. 936 P. 229; Sect. 8(c); Title 28, Section 230, United States Code.

At the creation of the Court of Appeals for the District of Columbia statutory authority was given specifically given to "fix the time and method of taking appeals," but that this specific authority was withdrawn one year later when Section 6 of the act of creation, 27 Stat. 434, c. 74, February 9, 1893, was amended by the Act of July 30, 1894, c. 172, 28 Stat. 160 so as to eliminate from the act the reference to the power to make rules as to the time of taking appeals. That this elimination of the power to make rules with reference to the time of taking appeals left the local appellate court with the same authority, at least from

the language of the statutory enactments, that other federal circuit courts of appeals possessed and none other.

This general warrant of rule making authority is the only statutory grant by which the local court of appeals can ground its authority in this particular. Through subsequent legislation the Court of Appeals for the District of Columbia was affirmatively brought within the orbit of the Federal Judicial system both in interpretation by Courts and legislative fiat. Now, by name, legislative regulation of the manner of the exercise of its appellate jurisdiction, and, the Federal Rules of Civil Procedure, the analogy or parallel between the local courts and the federal courts has grown into almost complete identity.

B

Petitioner tried the cause in the nisi prius court upon the merits and at the conclusion of the hearing the court, sine die, and requested that the parties submit conclusions of law, findings of fact and forms of decrees or judgments. This was done and the matter remained with the court under advisement for approximately two weeks. Then without notice to parties or attorneys, the court signed from out of the papers submitted those he had determined represented his conclusions and directed the clerk to file them. No notice to parties or attorneys was given of this act, by the court, nor did the clerk, as he was required under rule 77 (d) of the Federal Rules of Civil Procedure, notify either attorneys or litigants.

That your petitioner treating the lack of notice as tolling the time within which the appeal should be taken, or as a ground for relief from the judgment, noted an appeal 23 days after the actual entry of the judgment, (the rule of the Court of Appeals required the appeal to be taken within 20 days), and filed a motion calling the Court's attention to the lack of notice and of his surprise at the action of the Court. The Court below vacated the judgment

and reentered the same upon the ground that the petitioner had not been notified of the judgment, whereupon a second notice of appeal was noted by petitioner. The appellate Court below held that the vacation of the judgment was only a dodge to extend the time for taking an appeal which was forbidden by holding that the court had not warrant to set aside the judgment for lack of notice. Your petitioner claims that the action of the appellate Court below improperly dismissed the appeal as not taken within time.

V

ARGUMENT

A

The United States Court of Appeals for the District of Columbia has no authority to fix a different time or manner of taking appeals from the District Court of the United States for the District of Columbia than that prescribed for similar appeals from Federal District Courts to Circuit Courts of Appeals of the United States.

By federal statute, approved February 4, 1893, C. 74, 27 Stat. 434, Congress did create what is now known as the United States Court of Appeals for the District of Columbia and did authorize said court in Section 6 thereof to "make such rules and regulations as may be necessary and proper for the transaction of business to be brought before it and *for the time and method of the entry of appeals.*" (Italics supplied) Section 6, however, was amended by the Act of July 30, 1894, c. 172, 28 Stat. 160, to read as follows:

> "Section 6. That said Court of Appeals shall establish by rule of Court such terms of the Court in each year as to it may seem necessary; Provided, However, that there shall be at least three terms each year, and it shall make such rules and regulations as may be necessary and proper for the transaction of its business *and the taking of appeals to said Court.*" (Italics supplied.)

Assuming that in the original act of creation the Court of Appeals, in its own discretion, had authority to promulgate a rule limiting the time for taking an appeal, it is implicit that by amending the original act of creation and eliminating from its provisons the language "the time and method of the entry of appeals" the Congress repealed the omitted provision.

King vs. Cornell, 106 U. S. 395, 27 L. Ed. 60.

Also see:

In Re Heath, 144 U. S. 92;
Jones vs. Crosswell, 60 Fed. 2nd 827.

The most liberal and favorable rule as to the extent of the lower appellate court's power to make a rule with reference to the time for taking an appeal would depend upon an absence of any statute of the federal government not locally inapplicable in the District of Columbia with regard to the subject matter. An examination of the pertinent statutes reveals without doubt that such liberality of construction is not indicated for there is a federal statute regulating the time for taking appeals in like circumstances.

Section 230, Title 28 of the U. S. Code prescribes the time for taking an appeal from a District Court to a Circuit Court of Appeals in the following language:

"Section 230. Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a Circuit Court of Appeals for review shall be allowed unless application therefore be duly made within three months after the entry of such judgment or decree. (Mar. 3, 1891, c. 517, Sec. 11, 26 Stat. 329; February 13, 1925, c. 229, Sec. 8 (c), 43 Stat. 940."

(N. B. Writs of error abolished 45 Stat. 45; 1928)

In the Act of February 13, 1925, Chapter 229, 43 Stat. 936, amending Section 240 of the Judicial Code, entitled "an Act to amend the Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and for other purposes," Congress, for the first time, makes provision for the manner of the exercise of the jurisdiction of the United States Court of Appeals for the District of Columbia:

> "Section 5. That the Court of Appeals of the District of Columbia shall have the same appellate and supervisory jurisdiction over proceedings, controversies, and cases of bankruptcy in the District of Columbia, that a Circuit Court of Appeals has over such proceedings, controversies, and cases within its circuit, and shall exercise that jurisdiction in the same manner as a Circuit Court of Appeals is required to exercise it."

Now, however, no Circuit Court of Appeals can fix a different time for taking an appeal than that set out by Section 230, Title 28, supra. This Court in *Alaska Packers* vs. *Pillsbury, Deputy Commissioner*, 301 U. S. 174, (1937), which cause arose under the Longshoremens and Harbor Worker's Act, held that a rule respecting the manner of taking an appeal adopted by the United States Circuit Court of Appeals for the Ninth Circuit, which was not in accord with Section 230, Title 28, supra, had no force. At page 177, this Court said:

> "but this rule controvenes the Statute and has no force, for the power of the Court to make rules necessarily is confined to such as are consistent with controlling laws."

It is difficult to justify the exercise of its jurisdiction to make rules in making a rule limiting the time within which an appeal may be taken to a period shorter than that provided in the Act of February 13, 1925, supra, when every legislative and judicial effort has been made through chang-

ing its name, jurisdiction and procedure, to make the parallel between the local Courts and the Federal Courts, if not their legal identity complete. Indeed this Court has had occasion to remark in *O'Donoghue* vs. *United States*, 269 U. S. 516, 77 L. Ed. 1356, reversing the Court of Appeals, D. C., at page 1367:

> "The parallelism between the Supreme Court of the District of Columbia and the Court of Appeals, on the one hand, and the District Courts of the United States and the Circuit Courts of Appeals, on the other, in consideration and disposition of cases involving what among states would be regarded as within federal jurisdiction is complete."

Furthermore, in 1937, pursuant to statutory authority and direction vested in it by Section 2 of the Act of June 19, 1934, chapter 624, 48 Stat. 1665, 28 U. S. Code, Sec. 723 (b), (c), adopted rules of civil procedure for the District Courts of the United States and for certain aspects of appellate methods and procedure in Circuit Courts of Appeal. These rules were made applicable to the Courts of the District of Columbia in their entirety.

Rule 81 (d) Federal Rules of Civil Procedure. Without determining the power of this Court thereunder to change the time provided by law for taking an appeal in Title 28, Section 230, supra, it did not do so, but rather, in consonance with said statute, promulgate Rule 73, the pertinent part of which is as follows:

> "Appeal to a Circuit Court of Appeals"
>
> "(a) How taken. When an appeal is permitted by law from a District Court to a Circuit Court of Appeals and within *the time prescribed*, a party may appeal from a judgment by filing with the District Court a Notice of Appeal." (Italics supplied.)

"The time prescribed" referred to in the above Rule, and

that which is in force generally among all federal courts is the three month period set out in Section 230, Title 28, supra. This is the view of the Advisory Committee on Rules. See notes of Advisory Committee on Rules at page 750 of Title 28, following Section 823 (c) reading as follows:

> "3. This rule continues in effect the Statutes providing for the time for taking an appeal such as: U. S. C. Title 28, Sec. 230 (Time for making application.)

It is respectfully submitted that the invocation of Rule 10 of the United States Court of Appeals for the District of Columbia, which was adopted by that Court in 1893, to dismiss the appeal in that court of your petitioner, which rule prescribes a twenty (20) day period, is without warrant in law.

B

The Lower Court has improperly applied decisions of this Court and improperly interpreted Rule 77 (d) of the Federal Rules of Civil Procedure.

In sustaining the respondent Hawes' motion to dismiss the appeal of your petitioner from an adverse decision of the District Court of the United States for the District of Columbia, the Court below disposes of Rule 77 (d) in the following fashion:

> "We think that the requirement of Rule 77 (d) that the clerk immediately upon entry of judgment shall serve notice of the entry by mail upon the affected parties and make a note in the docket of such notice should be complied with in every case, nevertheless the effectiveness of a judgment does not depend upon compliance with that requirement, but only upon notation in the civil docket as provided by Rules 58 and 79 (a); and we think that the failure of the clerk to compl-

with Rule 77 (d) did not warrant the District Court's setting the judgment aside."

Rule 77 (d) of the Federal Rules of Civil Procedure replaced old Equity Rule 4 of this Court which provided as follows:

NOTICE OF ORDER

"NEITHER the noting of an order in the Equity docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the Court, or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order."

Reading the two rules together it is plain to see that the intent of the Court was to provide notice to parties of the action of a Court in cases where, at least, there was not actual notice. It is a rather shocking conclusion which permits a Court to make a rule that an act has to be done within 20 days of the happening of an event which is not controlled by a party, affirmatively provide for notice in the event that he is not present or actually aware of the happening of the event, and, then deprive him of the exercise of that right, when the failure to exercise it is attributable to the failure of its clerk to provide notice in violation of its rules. Indeed the virtual emasculation of Rule 77 (d) by the lower Court's decision effectively deprives the petitioner of his right of appeal by interpretation and construction. Under its decision, the right to notice occupies the same relative position as the highly popular, but totally unnecessary practice of including prize whistles in bags of popcorn.

In reaching its conclusion the lower Court, in effect, says

that complaint made under Rule 60 (b) for relief from a judgment may be had where "the mistake, inadvertence or surprise was that of a party or his legal representative" and, concludes, that since the "mistake" was that of the clerk, no relief as against that judgment was permitted your petitioner thereunder. Your petitioner has no quarrel with the conclusion that the mistake was that of the clerk in failing to notify him or his counsel, but he assuredly says that both he and his counsel were "surprised" by the irregular entry of the judgment to their prejudice, and consequently entitled to relief therefrom under Rule 60 (b). It is suggested that inasmuch as the trial Court's action was not void in setting aside the judgment of May 7, 1940, and certainly not an abuse of discretion, the lower court erred in dismissing the appeal of your petitioner.

The lower Court cites, in support of its conclusion that the effect of the decision of the lower court was to improperly extend the time for taking an appeal, two cases heretofore decided by this Court, to-wit: *Credit Co.* vs. *Ark. Central Ry.*, 128 U. S. 258 (1888) and *Brooks* vs. *Norris*, 11 How. (U. S. 1850), which in effect say that a court has no power to extend the time for taking an appeal after it has expired. The only similarity between the cases cited and the case at bar is that they involve a situation where the time for appeal has expired. In neither of the cases was there any secret entry of a judgment in violation of direct rule of court to the prejudice of the prompt exercise of the right of appeal by a litigant.

In concluding its opinion the Court says "The device of attempted vacating of the first judgment and the filing and noting in the docket of another in the instant case we think equally ineffective. It, if recognized, would, like the nunc pro tunc order in *Credit Co.* vs. *Ark. Central Railway*, make a dead letter of our rule fixing a definite time for appeal." Their effort to save the life of Rule 10 of the Court of

Appeals while reading the funeral service of Rule 77 (d) is wholly inconsistent and untenable.

In conclusion your petitioner says that the decision of the lower court effective deprives your petitioner of his right of appeal without due process of law.

Respectfully submitted,

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